IRENE MITCHELL PALLIN
EDWARD E. MITCHELL, JR.

IBLA 83-985 Decided May 14, 1984

Appeals from a decision of the California State Office, Bureau of Land Management, rejecting in part Indian allotment application CA 4965 and rejecting Indian allotment application CA 5366.

Set aside and remanded.

1. Indian Lands: Allotments: Generally--Indian Lands: Trust Patent

A "trust patent" cannot be canceled administratively without providing notice and opportunity for a hearing, and any purported cancellation which is not premised on due process is without effect and void.

APPEARANCES: Paul A. Centolella, Esq., Columbus, Ohio, for Irene Mitchell Pallin, appellant; Jack L. Schwartz, Esq., Portland, Oregon, for Edward E. Mitchell, Jr., appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Irene Mitchell Pallin (Pallin) and Edward E. Mitchell, Jr. (Ed Mitchell, Jr.), appeal from an August 11, 1983, decision by the California State Office, Bureau of Land Management (BLM). BLM rejected in part and approved in part Pallin's application for Indian allotment CA 4965. BLM rejected Ed Mitchell, Jr.'s application for Indian allotment CA 5366 in its entirety.

Pallin and Ed Mitchell, Jr., are sister and brother, and are members of the Yurok Tribe. Pallin and Ed Mitchell, Jr., have filed Indian allotment applications for the same tract of public land, which consists of 160 acres in the E 1/2 SW 1/4, S 1/2 SE 1/4, sec. 29, T. 10 N., R. 4 E., Humboldt meridian, Humboldt County, California. The land was originally allotted to Nancy Burrill, appellants' grandmother, on September 23, 1907, through the issuance of a trust patent. The allotment has been the family home place for over 75 years, and it has been continuously used and occupied by appellants, their parents and grandparents since 1907.

In 1954, BLM discovered that Burrill had illegally received two allotments. One, comprised of 20 acres on the Hoopa Valley Reservation, No. 139-T, was issued under authority of section 1 of the General Allotment Act of 1887; 25 U.S.C. § 331 (1976). The other comprised 160 acres, No. 108 (the land

disputed herein), and was issued pursuant to section 4 of the General Allotment Act, supra. Pursuant to 25 U.S.C. § 343 (1976), BLM canceled the trust patent on the 160-acre tract on May 16, 1957, some 50 years after issuance of the trust patent, and long after Nancy Burrill had died. The trust patent was canceled because 160 acres is the maximum acreage that could be allotted under the General Allotment Act, and because the 20-acre tract (No. 139-T) was fee patented and, apparently, had been sold. There is nothing in the record to suggest fraud on the part of the allottee. Rather, the allowance of two allotments to her is more likely attributable to error on the part of the Bureau of Indian Affairs (BIA).

Burrill had allowed her son, Edward E. Mitchell, Sr., and his wife, Theresa, to occupy and improve the 160-acre allotment. Burrill died early in this century. Edward E. Mitchell, Sr., died in 1938, leaving his wife, Theresa, in possession of the land. Theresa Mitchell lived on the land until 1953, when her daughter, Pallin, occupied the land. Pallin and her non-Indian husband presently live on the property. Theresa Mitchell died in 1978. The Mitchells and Pallins have made considerable improvements to the allotment including a house, sheds, pens, corrals, and a large cattle barn. The allotment has and is being used to raise various livestock and vegetable gardens. The allotment allegedly has provided the Pallins' primary source of income for many years.

Subsequent to cancellation of the allotment where she was residing, Theresa Mitchell was informed by BLM that she was personally ineligible to receive the land under an Indian allotment application, so she did not apply for the land. Prior to cancellation of the trust patent, Pallin, Ed Mitchell, Jr., and one Manuel Mattz had each filed allotment applications for the land. These applications were rejected on June 27, 1957, as premature since the land had not yet been returned to the public domain.

On July 16, 1957, Pallin and Ed Mitchell, Jr., simultaneously filed allotment applications for the lands. After a drawing was held in September 1957 to determine priority, Pallin was awarded the land. On appeal, the decision was vacated because the land had not been classified. BLM then issued trust patents to Pallin and Ed Mitchell, Jr., for separate 80-acre tracts.

Pallin then appealed the BLM decision to the United States District Court for the Northern District of California. The District Court ordered cancellation of Ed Mitchell, Jr.'s trust patent since he was ineligible to receive it because he was an Indian living on an Indian Reservation at the time he applied for the allotment. Reservation Indians are specifically excluded by 25 U.S.C. § 334 (1976) from receiving allotments of nonreservation land. The District Court awarded the entire 160-acre tract to Pallin. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the cancellation of Ed Mitchell, Jr.'s patent, but reversed the remainder of the decision because the district court was without jurisdiction to conduct a trial de novo reviewing the Secretary's classification. 1/ The Ninth Circuit

1/ See Pallin v. United States, 496 F.2d 27 (9th Cir. 1974).

remanded to the Secretary to apply the proper standard for granting an Indian allotment. 2/ On remand, both patents were canceled.

On March 10, 1978, Pallin filed allotment application CA 4965 and on September 1, 1978, Ed Mitchell, Jr., filed allotment application CA 5366. In its August 11, 1983, decision, BLM concluded that the land is not suitable for agriculture or economically viable as a unit for grazing. Therefore, BLM rejected Pallin's application (CA 4965) for 160 acres. BLM also rejected Ed Mitchell, Jr.'s application (CA 5366) because he continued to reside on the Hoopa Indian Reservation and is ineligible for a nonreservation allotment. 3/ Even though it determined that the land embraced in Pallin's application (CA 4965) does not qualify for an allotment since it is not a viable economic unit capable of supporting a family, BLM awarded Pallin 40 acres on the SE 1/4 SW 1/4 sec. 29, T. 10 N., R. 4 E., Humboldt meridian, California, for equitable reasons. 4/

Among the arguments presented on appeal, it is asserted that the trust patent issued to Burrill was improperly canceled in 1957. The arguments include a contention that the cancellation of the trust patent in 1957 was not in accordance with due process, and that the cancellation therefore was invalid.

[1] Burrill applied for the disputed land in 1984 under the General Allotment Act, 25 U.S.C. § 334 (1976), providing for allotments to Indians not residing on reservations. Under this Act, an allottee receives a trust patent in which the United States holds legal title to the allotted land in trust for the allottee's benefit for 25 years. After that, the United States conveys the patent in fee to the Indian or his heirs, unless the trust period has lawfully been extended. See United States v. Rickerts, 188 U.S. 432, 436 (1902).

The original scheme of the General Allotment Act was to have the Federal restrictions expire automatically 25 years after the allotment was issued. An amendment to the Act added the provision that "the President of the United States may in any case in his discretion extend the period."

2/ "In short, the standard is whether the acreage, whatever it is (agricultural or grazing), will provide a home and furnish a livelihood to an Indian and his family by farming, grazing livestock, or both." Pallin v. United States, supra at 34. See also Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968).

3/ Ed Mitchell, Jr.'s ineligibility for an allotment was fully litigated in Pallin v. United States, supra, and is therefore res judicata. See 25 U.S.C. § 334 (1976). Moreover, Ed Mitchell, Jr., conceded in his brief that he is presently living on his wife's reservation. Therefore, he continues to remain statutorily ineligible to receive an Indian allotment pursuant to 25 U.S.C. § 334. However, Ed Mitchell, Jr., is not precluded from inheriting an interest in the allotment. Public domain allotments are inheritable. 25 U.S.C. § 348.

4/ Among the equitable reasons considered by BLM were: Pallin's continuous occupation of the land; Pallin's improvements to the land; Pallin's diligent pursuit of an allotment.

25 U.S.C. § 348 (1976). The Appropriations Act of June 21, 1906, 34 Stat. 325, 25 U.S.C. § 391 (1976), broadened the President's extension power. See generally F. Cohen, Handbook of Federal Indian Law 619 (1982 ed.). The Supreme Court has sustained Congress power to provide for extension of restrictions. E.g., Heckman v. United States, 224 U.S. 413 (1912). Exec. Order No. 6498 (Dec. 15, 1933) extended all trust periods expiring in 1934 for a period of 10 years from when the trusts would otherwise expire.

The trust period for Burrill's patent, unless extended, was scheduled to expire on September 23, 1932. By Exec. Order No. 3365 (Dec. 7, 1920), the President declared trust periods for all allotments on public domain to be extended "for a further period of 25 years from the date on which any such trust would otherwise expire."

Therefore, for our purposes, Exec. Order No. 3365 extended the trust period on Burrill's allotment from September 23, 1932, to September 23, 1957. 5/ Other executive orders and orders of the Secretary have extended trust periods indefinitely. See 25 CFR Chap. I, Appx. (1983). Therefore, Burrills's trust period has been extended continuously to the present.

5/ The author, personally and apart from the majority, desires to take notice of the following. Fifteen years prior to Exec. Order No. 3365, the Attorney General addressed the legality of a proposed order with a similarly phrased extension as follows:

"The allotment act of February 8, 1887 (24 Stat. 388) provides for trust patents to allottees to be good for twenty-five years, to be followed by other patents under which the lands will be alienable. Referring to the twenty-five years' period, the act has the following proviso: 'That the President of the United States may in any case in his discretion extend the period.'

"It will be observed that the words "in any case" would seem to indicate that the wholesale extension of the patents was not intended, but that a special examination or knowledge of particular cases was contemplated. That this was the actual purpose of using those words appears from a conference report under the bill. The conferees on the part of the House, in their formal statement, say:

'Amendment 7 allowed the President of the United States, in his discretion, to extend the period in which the lands allotted to individual Indians should be held in trust by the United States. The conference report only inserts the words "in any case," so as to require the President to extend this period only in special cases.'

"I am of the opinion, accordingly, that a general extension of the time in the manner proposed would be contrary to the intent of the act." 25 Op. Att'y Gen. 483 (1905) (emphasis in original).

Moreover, in 1941, the Solicitor of the Department of the Interior objected to a proposed order similar to Exec. Order No. 3365. Citing the 1905 Attorney General's Opinion, the Solicitor concluded that an Executive order attempting to extend trust periods regardless of when they expire is too general, and contrary to the Congressional delegation of that power. Solicitor's Memorandum for the Commissioner of Indian Affairs (Oct. 31, 1941), found in Opinions of the Solicitor Relating to Indian Affairs, 1079 (1917-74).

The determinative issue on appeal concerns the cancellation of the trust patent on May 16, 1957. The issue is whether or not the cancellation was valid and effective.

Although the record makes numerous references to the cancellation, there is no indication that regular procedures were followed to effectuate the cancellation. The record reflects that BLM notified Pallin by letter of October 9, 1956, that BLM was recommending cancellation of the trust patent. By letter of November 6, 1957, to the Commissioner of Indian Affairs, Pallin acknowledged that she was informed by the Bureau of Indian Affairs in December 1955 that the allotment was to be canceled. Therefore, it appears that at least Pallin had notice of the proposed cancellation. However, notice of the cancellation must be afforded to all parties. Lizzie Bergen, 30 L.D. 258, 267 (1900). Action may not be taken "without notice to [the] interested parties." Brown v. Hitchcock, 173 U.S. 473, 478 (1899). "In all cases involving the investigation of Indian allotments every precaution should be taken to insure that notice of the proceedings shall reach all parties * * *." Lizzie Bergen, supra at 267 (emphasis added). "Due notice" must be afforded to "all parties." Regulations, 30 L.D. 546, 547 (1901).

However, there is nothing in the record to indicate that Theresa Mitchell (as an heir of Ed Mitchell, Sr.), Ed Mitchell, Jr., or any of Burrill's or Mitchell's other heirs, had notice of the proposed cancellation. There is absolutely no evidence in the record that the interested parties were given an opportunity for a hearing concerning the cancellation of the trust patent. None of the parties was afforded a hearing, or any opportunity to contest the cancellation in any way.

The authority to cancel a trust patent is recognized in 25 U.S.C. § 343 (1976), 6/ which provides in pertinent part:

> The Secretary is authorized and directed, during the time that the United States may hold title to the land in trust for

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fn. 5 (continued)

Consequently, Exec. Order No. 3365 is of dubious efficacy and its applicability to public domain allotment trust periods expiring between 1920 and 1934 is somewhat uncertain. If Exec. Order No. 3365 was not efficacious, then the trust period would have expired on September 23, 1932, and a fee patent would have been owed. An action in 1957 to cancel a fee patent earned in 1932 would have been barred by 43 U.S.C. § 1166 (1976), a 6-year statute of limitations. Since this Board is an administrative tribunal and part of the Executive Branch, we are without authority to hold that an executive order is unlawful. Such a determination could only be made by a Federal court of competent jurisdiction.

6/ The Secretary's authority to cancel a trust patent pursuant to 25 U.S.C. § 343 (1976) was recognized in Fairbanks v. United States, 223 U.S. 215 (1912); Garfield v. United States, 211 U.S. 249 (1908); Tiger v. Twin State Oil Co., 48 F.2d 509 (10th Cir. 1931); United States v. Chehalis County, 217 F. 281, 284 (W.D. Wash. 1914); Instructions, 32 L.D. 17, 19 (1903). See 42 C.J.S. Indians § 49 (1944).

> any such Indian * * * to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issuance thereof.

There is no doubt that the Secretary was empowered to cancel the trust patent, assuming that it had not ripened into fee title. The problem, which is the crux of this appeal, is that the procedure did not comport with due process when the trust patent was canceled.

Procedural due process imposes certain requirements on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. "The history of liberty has largely been the history of procedural safeguards." McNabb v. United States, 318 U.S 332, 347 (1947). "The right to be heard before being condemned to suffer grievous loss of any kind * * * is a principle basic to our society." Matthews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

Due process analysis requires a two-step process of first deciding whether the interest is protected by due process, and then deciding what procedure due process requires. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). Due process is not a technical concept with a fixed content unrelated to time, place, and circumstances. Rather, due process is flexible and calls for such procedural protections as the particular situation demands. Matthews v. Eldridge, supra at 334.

Here, the issue is whether Burrill's heirs (and their heirs) have a sufficient property interest in the trust patent to warrant due process protection. "To have a property interest in a benefit, a person must have * * * a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In Pence v. Kleppe, 529 F.2d 135, 140-42 (9th Cir. 1976), even an applicant for an allotment of land pursuant to the Alaska Native Allotment Act 7/ was held to have a sufficient property interest to warrant due process protection. See Kaycee Bentonite Corp., 79 IBLA 182, 188-90, 91 I.D. 138, 142 (1984). Here, it seems elementary that due process protection was warranted. The property interest at stake here is not merely a piece of land. The heirs of the allottee have continued to occupy, maintain, improve, and cultivate the land since 1907. Over 75 years of occupancy and considerable improvements have made the allotment a family homeplace. Certainly, this constitutes a property interest worthy of due process protection.

In Fairbanks v. United States, 223 U.S. 215 (1912), the Supreme Court held that cancellation of an allotment requires notice and opportunity to be heard. See also Tiger v. Twin State Oil Co., 48 F.2d 509 (10th Cir. 1931); 42 C.J.S. Indians § 49 (1944). In Garfield v. United States, 211 U.S. 249 (1908), the Court held that the Secretary of the Interior must afford due process before removing an Indian (who had received a certificate of allotment) from the rolls of his tribe. "The right to be heard before property is

7/ May 17, 1906, 34 Stat. 197, repealed in 1970.

taken or rights or privileges withdrawn * * * is the essence of due process of law." Id. at 262.

An Indian allottee acquires an equitable title in the land allotted, while the legal title remains in the United States. See Wyoming v. United States, 255 U.S. 489, 501 (1921); United States v. Rickert, supra; Lizzie Bergen, supra. "The government holds legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process implies notice and a hearing." Brown v. Hitchcock, supra at 478, quoting Orchard v. Alexander, 157 U.S. 372, 383 (1895). 8/ The issuance of the trust patent granted an equitable title to the allottee (Burrill), which therefore created a property interest. Cancellation of the trust patent in 1957 required compliance with due process, and the record does not reflect such compliance.

In Garfield v. United States, supra, the Court stated, at 211 U.S. 263-64:

> The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired.
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> [T]he question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case.
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> For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made.

Now that we have concluded that due process was required, we must determine what process was due. Goss v. Lopez, 419 U.S. 565, 577 (1975). 9/

8/ See Garfield v. United States, supra, which noted that "it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard." Id. See also Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 593 (1897); Parsons v. Venzke, 164 U.S. 89 (1896); Cornelius v. Kessel, 128 U.S. 456 (1888). Power to correct errors involving public lands is "not unlimited or arbitrary power." Id. at 461.

9/ The overshadowing due process case of the 1970's was Goldberg v. Kelly, 397 U.S. 254 (1970). Goldberg set forth many additional requirements for procedural due process. See Circle L., Inc., 36 IBLA 260, 266-67 (1978) (Fishman, A. J., dissenting). For resolution of this appeal, it is not necessary to decide which of the additional Goldberg requirements may be required for cancellation of a trust patent. However, at a minimum, notice and an opportunity for a hearing are required. E.g., Fairbanks v. United States, supra.

At a minimum, due process requires that deprivation of life, liberty, or property be preceded by "notice and opportunity for hearing appropriate to the nature of the case." Logan v. Zimmerman Brush Co., supra at 428, citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 309 (1950). "An elementary and fundamental requirement of due process * * * is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 13 (1978), quoting Mullane v. Central Hanover Bank & Trust Co., supra at 314. See Pence v. Kleppe, supra at 142; Kaycee Bentonite Corp., supra at 188-90, 91 I.D. 142. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 68 U.S. 223, 233 (1863). The purpose of notice is to apprise the individual of, and permit adequate preparation for an impending hearing. Memphis Light, Gas & Water Division v. Craft, supra at 14. Here, it appears that Pallin had notice, but the other interested parties did not.

In addition to being afforded notice of the proposed action, one must also be granted the opportunity for a hearing concerning the proposed action. "The fundamental requisite of due process of law is the opportunity to be heard." Goldberg v. Kelly, supra at 267, quoting, Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The Court has consistently held that "some kind of hearing" 10/ is required before one is deprived of a property interest. E.g., Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 299 (1981); Parratt v. Taylor, 451 U.S. 527, 540 (1981). "[A] hearing in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and if need be, by proof however informal." Londoner v. Denver, 210 U.S. 373, 386 (1908). The timing and nature of the required hearing "will depend on appropriate accommodation of the competing interests involved." Goss v. Lopez, supra at 579. 11/ "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra at 268-69.

Here, the record does not indicate that any of the interested parties were afforded an opportunity for a hearing concerning the cancellation of the

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10/ See Friendly "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267 (1975).

11/ These "competing interests" include the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved. Logan v. Zimmerman Brush Co., supra. To identify the specific dictates of due process, three distinct factors must be considered:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews v. Eldridge, supra. See Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

trust patent. Therefore, the cancellation did not comport with due process, and was void and of no effect.

The denial of due process invalidates judgments of courts and decisions of administrative bodies. See Moore v. Dempsey, 261 U.S. 86 (1923). In Roberts v. Anderson, 66 F.2d 874, 876 (10th Cir. 1933), the court noted if "the determination * * * was lacking in the essentials of due process, then the determination is a nullity * * *." In I.C.C. v. Louisville & Nashville R.R., 227 U.S. 88, 91 (1913), the Court noted that "administrative orders, quasi-judicial in character, are void if a hearing was denied * * *." A judgment or decree may not be binding unless the party has had an opportunity to be heard. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); 16 Am. Jur. 2d Constitutional Law § 839 (1979). Therefore, all actions subsequent to the putative cancellation of the trust patent in 1957 are void and of no effect.

Since the allottee died before the putative cancellation of her trust patent, the heirs of the deceased allottee must be identified. Upon the death of an Indian allottee, the decedent's interest passes to the heirs or devisees. 25 U.S.C. §§ 348, 372, 373 (1976). This should have been done when Burrill died. The Secretary has exclusive jurisdiction to determine heirship of allottees during the trust period. Lane v. Mickadiet, 241 U.S. 201 (1916); Hallowell v. Commons, 239 U.S. 506 (1916). See Arenas v. United States, 95 F. Supp. 962, 964-65 (S.D. Cal. 1951), aff'd, 197 F.2d 418 (9th Cir. 1952). The Secretary's decision determining the heirs is final and conclusive. United States v. Bowling, 256 U.S. 484 (1921); Hallowell v. Commons, supra. The Secretary's powers and duties regarding trust allotments of deceased allottees is set forth in 25 U.S.C. § 372 (1976), 12/ which provides in part:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as hereinafter provided, 13/ the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: Provided, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor * * * Provided, That the proceeds of the sale of inherited lands shall be

12/ Act of June 25, 1910, ch. 431, § 1, 36 Stat. 855.

13/ The Board has no information concerning whether Burrill, Edward Mitchell, Sr., and Theresa Mitchell died intestate.

> paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests shall appear * * *.

Accordingly, on remand, BLM's first obligation, in cooperation with BIA, is to identify the heirs of Burrill, and if necessary, their heirs, and their respective interests. BLM then may proceed in accordance with due process either to cancel the trust patent, or to issue a fee patent to the heirs and partition the tract, or to sell the tract and distribute the proceeds to competent heirs and retain the proceeds of any incompetent heirs in trust, or take any other appropriate action authorized by law. See generally Solicitor's Opinion, 48 I.D. 643 (1922).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this case is set aside and remanded to BLM for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge